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IN THE UNITED STATES SUPREME COURT

1982 TERM

DARLYS FOSTER STEED,

PETITIONER

V.

UNITED STATES OF AMERICA,

RESPONDENT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS FOR REVIEW

I. Whether the District Court's post jury verdict, fact-based determination that the evidence was insufficient to convict and consequent entry of judgment of acquittal should be accorded absolute deference upon a government appeal.

II. Whether the Fourth Circuit had authority to reverse the District Court's granting of a new trial in light of 18 U.S.C. §1291 requiring finality of judgments prior to appeal.

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JURISDICTIONAL STATEMENT

The jurisdiction of this Court is invoked on Petition for Writ of Certiorari to the Fourth Circuit Court of Appeals upon its order dated March 25, 1982, pursuant to 28 U.S.C. 1254(1).

STATUTES

18 U.S.C. 1291:

The courts of appeals shall have jurisdiction of all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District

Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court.

18 U.S.C. 3731:

In a criminal case, an appeal by the United States shall lie to a court of appeals from a decision, judgment or order of a district court dismissing an indictment or information as to any one or more counts, except that no appeal shall lie where the double jeopardy clause of the United States Constitution prohibits further prosecution.

An appeal by the United States shall lie to a court of appeals from a decision or order of a district court suppressing or excluding evidence or requiring the return of seized property in a criminal proceeding, not made after the defendant has been put in jeopardy and before the verdict or finding on an indictment or information, if the United States attorney

certifies to the district court that the appeal is not taken for the purpose of delay and that the evidence is a substantial proof of a fact material in the proceeding.

The appeal in all such cases shall be taken within thirty days after the decision, judgment or order has been rendered and shall be diligently prosecuted.

STATEMENT OF THE CASE

In early January, 1977, Thomas Beasley, owner of a large tract of land in Floyd County, Virginia met with Frank Joe Steed, a land developer from Memphis, Tennessee, at the law offices of Donald Williams in Roanoke, Virginia. Dana Hockensmith, attorney for Frank Joe Steed, Williams, attorney for Thomas Beasley, and

were also present at this meeting. Darlys Foster Steed ("Steed") did not attend.

Those present engaged in a discussion which began on broad terms, initially entertaining the notion of developing the entire Beasley tract. From this starting point, the talks narrowed as a result of financial realities and the main thrust of the meeting that day became the development of a portion of Beasley's land. The talks culminated in an agreement by Thomas Beasley to sell a portion of his land to Parkway Development Corporation, an entity which Williams and Frank Joe Steed subsequently created. This development was to be accompanied by a legitimate filing with HUD, a condition on which Frank Joe Steed insisted, and which Williams believed could be met legally by way of a filing for an exemption. The agreement concerned only the development of one parcel of Beasley's tract, later to be called Park Ridge

Forest. No other offer to buy or option to sell the remainder of Beasley's land was made, and no discussion or contemplation of illegal activity took place at the meeting.

At the direction of Frank Joe Steed, Parkway Development Corporation was subsequently formed and Steed (Frank Joe Steed's wife), who had not attended the meeting in January, was designated its president. In the months that followed, Frank Joe Steed hired a bookkeeper, Clyde Parrish, a Project Dierctor, Lewis Allen, and spoke with a construction worker, Robert Batemen, about grading work needed at the development. Later, Frank Joe Steed hired Jack Atkinson to replace Lewis Allen.

In contrast to the active role assumed by Frank Joe Steed, during the period between early January and midsummer of 1977, it was noted of Steed: that her visits to Attorney Williams' office were generally with her husband, and only "on

occasion" did she come alone; that when she came alone to sign documents prepared for her by Williams, she indicated she did not know what she was signing; that she had nothing to do with the daily operations of Parkway Development Corporation; that she never gave instructions to Williams or his secretary ; that she was not Lewis Allen's employer; that she visited the sales office only a couple of times; and that when she came, she merely walked around the office, visited with the sales staff, and did nothing as far as the business was concerned.

On June 6, 1977, Darlys Steed signed a contract for the sale of the Park Ridge Forest subdivision of Beasley's land to the Parkway Development Corporation. It was on this occasion that Beasley first met Darlys Steed. At this meeting she also signed a Comprehensive Statement to be filed with

HUD which contained the following statement:

> There is no additional land owned or under option or other consideration for purchase by the developer that might be offered as part of a common promotional plan.

Donald Williams subsequently mailed the Comprehensive Statement to HUD. Having thus filed, Parkway Development Corporation began to advertise and sell lots from Park Ridge Forest. Solicitation of purchasers was effected by means of mailgrams sent from Insentive Productions, a Memphis corporation owned by Darlys Steed. At some time later in the year, after the bulk of the lots in Park Ridge Forest had been sold, Williams Development Corporation (an entity owned by Donald Williams, and in which the Steeds had no interest) acquired a tract of land contiguous to Park Ridge Forest from Beasley and began to offer lots for sale. The solicitation for this subdivision, called Park Ridge West, was

through Incentive Productions. Sometime thereafter, Blue Ridge Development Coroporation, another entity in which the Steeds had no interest, began to solicit through Incentive Productions the sale of lots in another portion of Beasley's tract.

On March 21, 1977, a Federal Grand Jury returned an indictment against Darlys Steed charging her with one count of mail fraud (in violation of 18 U.S.C. §1341) and two counts of furnishing a false statement to HUD (in violation of 15 U.S.C. §1717), all based upon the allegedly false statement she made in the Comprehensive Statement. Steed plead not guilty to all counts of the indictment and the case was tried to a jury on August 21, 1979 with Chief Judge James C. Turk presiding.

On August 21, 1979, at the close of the Government's case in chief, Steed moved for judgment of acquittal on all three counts. Judge Turk granted her motion as

to Count Two for lack of evidence to support the allegation in the indictment and denied the motion as to Counts One and Three. At the close of the Defendant's case, defense counsel renewed the Motion for Judgement of Acquittal which Judge Turk took under advisement.

After deliberating for two hours, the jury returned verdicts of guilty on Counts One and Three. Defendant entered an oral motion for new trial and renewed its Motion for Judgement of Acquittal. On September 27, 1979, Defendant filed a written Motion for Judgement of Acquittal or New Trial.

On October 26, 1979, after oral argument in support of and against the Motion for Judgment of Acquittal or New Trial, the Court set aside the jury verdict and entered Judgment of Acquittal finding that the evidence was insufficient to support a verdict of guilty. In ruling on the Motion, the Court also said that it

would have granted a new trial based upon its conclusion that it had incorrectly denied defense objections to the admission of certain Government evidence.

In that the issues raised in this Court turn upon precisely what the trial court did, it is appropriate to quote at length from District Judge's statements at the hearing:

"And I will frankly say I thought there would be a verdict for the defendant. There was not, the jury found the defendant gulty as to both charges, but the Court feels that no rational finder of fact could have found proof beyond a reasonable doubt on the evidence that was before the jury at the time." (A 30).

"..... But I want to also say for the record that if the Court had found sufficient evidence for the jury's verdict, the Court would still have set aside the verdict in this case as to each count, because the Court feels like that the evidence as to the purchasers who came here and testified was highly prejudicial to the defendant and that the prejudicial [value] of their testimony far outweighed any probative value that their testimony might have had in the case." (A 31).

"..... I want also to say that even if the Court felt that there was sufficient evidence, the Court would still set aside the verdict and would have granted the defendant a new trial." (A 32).

The Government filed it's Notice of Appeal on October 26, 1979 and requested transcription of the trial proceedings on October 31, 1979. The case was briefed and argued to a three judge panel of the Fourth Circuit Court of Appeals which issued its opinion on April 9, 1981.

The panel opinion addressed the issues of the Government's right to appeal and evaluated the proper standard for review of the District Court's determination of the insufficiency of the evidence. Finding, in a 2-1 opinion, that the proper reviewing standard was absolute deference to the trial court, the panel affirmed the acquittal.

The Government filed a Request for Rehearing en banc which was granted and the Fourth Circuit, sitting en banc issued its opinion on March 25, 1982. The opinion reversed the trial court, finding that the proper standard for review was whether the

evidence, when taken in a light most favorable to the Government, supported the jury verdict. The Fourth Circuit Court found pursuant to this standard sufficient evidence to support the jury verdict.

The Fourth Circuit also addressed the issue of the trial court's granting of a new trial, quoting with approval Steed's brief saying that the District Court's language in effect granted defendant's motion for a new trial. The Fourth Circuit considers its authority to rule on the granting of the motion for new trial, finds that it has such authority and reverses, prior to any retrial, the grant of a new trial.

Steed seeks review of the Fourth Circuit's decisions regarding the standard of review and the authority for the government's right to appeal the trial court's grant of a new trial.

ARGUMENT

I The District Court's post jury verdict, fact-based determination that the evidence was insufficient to convict should be accorded absolute deference upon appeal.

This is a case of first impression in the United States Supreme Court and it entails resolution of a question which is critical to the proper administration of criminal justice. The trial court's long standing function in the criminal process encompasses a broad spectrum of obligation and concommitant discretion. The latitude of its discretion regarding its evaluation of the facts of a criminal case illustrates the importance which our system has accorded this role. This court has not had an opportunity to establish parameters for review of the district court's most fundamental and sacrosanct function. This case provides this Court with an

opportunity to determine the exact extent of this trial court function.

As this court has said in the United States v. Martin Linen Supply Co., 430 U.S. 564 (1977), the differentiations in timing for a trial judge's entry of judgement of acquittal were "...intentionally incorporated into the rule [26] to afford a trial judge the maximum opportunity to consider with care a pending acquittal motion." The rule recognizes the common law tradition of the judge's "right" to interrupt the criminal process at any stage and enter judgement of acquittal for the defendant. Indeed, the trial court's discretion is relatively immune from the government appeal; the inviolability of the court's decision is impinged upon only by the Criminal Appeal's Act, 18 U.S.C. §3731, enacted in its present form in 1971. This Act permits the United States to appeal from a decision of a district court

dismissing an indictment or information, or a suppression ruling which is not made after the defendant has been put in jeopardy, if the United States attorney certifies to the court that the appeal is not taken for the purpose of delay and that the evidence excluded it is a substantial proof of a material fact. It is clear that the government's right to appeal is narrowly circumscribed by the Act and, indeed, Mr. Justice Stevens, concurring in Martin Linen, supra has even pointed out that there is no statutory authority for an appeal of a judgement of acquittal pursuant to the Act. The deference accorded the district court's dismissal of criminal cases is both a necessary and proper function of the trial court in our criminal justice system.

This Court has said that the trial judge's latitude in dismissing criminal prosecution is designed "...to provide

additional protection to a defendant by filtering out deficient prosecutions, ..." Martin Linen, supra at 575. Illustrative of the importance of these functions is United States v. Sanabria, 437 U.S. 54 (1978). In Sanabria this court had occasion to reiterate the importance of finality with regard to a review of a district court's exclusion of certain evidence and on the basis of the remaining evidence entering a judgement of acquittal. The trial court in Sanabria had found the indictment's description of the offense too narrow to permit the admission of certain evidence. While characterizing this ruling as an erroneous evidentiary ruling, this court concluded that "...judgement of acquittal, however erroneous, bars further prosecution on any aspect of the count and hence bars appelate review of the trial court's error." (emphasis added), Sanabria, 437 U.S. 69. If the trial court's role in

weeding out deficient prosecutions is so important in our criminal justice system that this court both finds that the judge had made an erroneous ruling and yet bars review of that ruling, then, a fortiori, this court should not permit review of a trial court's evaluation of the facts presented in support of the government's case.

The only logical distinction between the court dismissing a case in midtrial or after discharge of a jury incapable of reaching a verdict and its dismissal in the case at bar is the time at which the judge decided to enter the judgement of acquittal. The time moment in the process at which the decision is made does not alter the court's function; it is performing the critical role of filtering out deficient prosecutions. The insufficiency of the evidence is no less insufficient prior to the jury's verdict

than afterwards. Until the 1970 Act, the trial court's ruling in the case at bar would have been shielded from review. Fong Foo v. United States, 369 U.S. 141, 143 (1962). The legislative history of the Act does not indicate that Congress intended to change this aspect of the court's function. The very language of the Act contains nothing which would permit an appeal of a judgement of acquittal entered subsequent to the jury verdict and this court has not yet had occasion to rule on the issue. Nevertheless, the legislative history and the Act itself illustrate no desire on the part of Congress to modify in any way that traditionally absolute power.

The Senate Report describes the purpose of the Bill as being "...to resolve serious problems which frequently have arisen with respect to the right of the United States to appeal rulings which terminate prosecutions other than by

judgements of acquittal..." S Rep No.91-1296, p.2 (1970). It goes on to say that the new Bill was designed to amend the old statute to provide for appealability of "...certain kinds of dismissals and suppressions." Id. 4. Furthermore, the Committee believed that the Constitution barred any appeal from an acquittal or from a dismissal amounting to an acquittal: "[a] true acquittal is based upon the insufficiency of the evidence to prove an element of the offense." Id. 11. As Mr. Justice Stevens said in his concurring opinion to Martin Linen, supra. at 580, 581:

> An attempt to authorize the Government to appeal from acquittals would have represented a radical change in the law....
>
> Interpreting legislative history is sometimes a complexing and uncertain task. In this instance, however, the legislative history is absolutely clear: Congress was interested solely in expanding the government's right to appeal from the dismissal of an indictment; it had no desire to allow appeals from acquittals and believed such

appeals would be unconstitutional. Therefore, Congress did not intend to give the appellant court authority to review a district court's fact-based finding that the evidence was insufficient to convict.

The foregoing analysis leads to the conclusion that the standard of review, if review is permissable, should be one of absolute deference. These are fact-based determinations, not resolutions of legal issues. The trial court is clearly in the best position to evaluate the sufficiency of the evidence and to apply his expertise as the arbiter of such evidence where it fails to rise to the level necessary to convict.

In reviewing the Fourth Circuit Court of Appeal's opinion in the case at bar, it is apparent that the Criminal Appeals Act has been presumed to have exercised a most significant function of the trial court: the ability to eliminate from our criminal

justice system the prosecutions which are factually deficient. The presumption is unfounded. A review of the Act itself and its legislative history which surrounds it discloses no support for the presumption. Had Congress intended to so radically alter hundreds of years of trial court experience, then surely it would have made specific and lengthy reference to such an intent. No mention of such an intent is found and therefore the conclusion is compelled that the presumption is false.

If the presumption that the appellate court may properly review the trial court's fact-based finding of insufficiency of evidence is false, then the standard of review ought to be one of absolute deference. This is not to say that the Government's right to appeal would be circumscribed as to other matters; legal determinations would still be subject to the same standard of review. Only factual

findings of insufficiency of the evidence would be subject to a standard of nonreview thereby preserving the critical role of the trial judge in the administration of criminal justice.

It might also be argued that the appellate court's review should not be eliminated entirely in these instances, but that some form of compromise between the attendant sanctity of the trial court's judgment and the government's desire to have an acquittal after a guilty verdict examined should be reached. It may be that there is some merit in allowing the appellate court to review such judgments, but at the same time maintaining the crucial importance of the trial judge's position vis-a-vis criminal jury trials.

The treatise writers have had occasion to note that the recent developments in this area have created the first real need to examine the trial court's discretion in

directing acquittals and, as they point out:

> The recent government appeal decisions can be justified much more easily if a more important and partly discretionary role is assigned to the trial judge. Factual control of the jury may be found an integral part of jury trial, a protection against the excesses of prosecution and jury combined that is as important as the jury's protection against possible excesses by prosecution and court combined. The trial judge's fact-based decision to acquit, based on the entire experience of trial, could well deserve protection against remote appellate control.

Wright, Miller & Cooper, Federal Practice and Procudure: Jurisdiction: §3919, p. 345 (1981 Pocket Part).

Therefore, the standard of review, should the Court find that there is one different from absolute deference, surely is not the one used by the Fourth Circuit in the case at bar. Taking the evidence in the light most favorable to the government is the standard applied to trial motions to acquit, there is no logic in applying it to

the appellate level. A standard more adequately protecting the trial court's role and his experience at trial would be that of an abuse of discretion where the appellate court would necessarily take into account the unique position that the trial courts have played in the history of the administration until the Steed decision threatens to drastically alter that role.

II The Fourth Circuit Court of Appeals could not reverse the district court's granting of a new trial prior to retrial.

This court has not had occasion to address the important issue raised by the instant case. There is a dearth of precedent in this area; no cases have been found in which the trial court entered both judgemnt of acquittal and granted the defendant's motion for a new trial on the same counts. However, as the Fourth

Circuit recognized (A 36), the trial court's language was tantamount to the grant of a new trial and it considered it as such. The Fourth Circuit opinion conflicts with other Circuits that have construed similar situations. The Fifth, First, Second and Ninth Circuits have all within the last five years decided that the Government may not appeal before retrial an order granting a new trial in a criminal case. United States v. Hitchmon, 602 F.2d 689 (5th Cir. 1979); In re United States, 565 F.2d 173 (1st Cir. 1977); United States v. Alberti, 568 F.2d 617 (2nd Cir. 1977); and United States v. Dior, 671 F.2d 351 (1982). Consequently, it is imperative that this court reslove this question so as to eliminate the apparent conflict between the Fourth Circuit and the other circuits mentioned.

The Analysis turns on a resolution of the two jurisdictional questions that arise

in a government appeal: (1) Whether there is statutory authority permitting the government to take the appeal and (2) whether the challenged order, decision or judgement itself is appealable. Dior, supra, at 356. Though this court has not resolved the issue specifically in a case of this kind, presuming that 18 U.S.C. §3731 grants the government the right to appeal and therefore satisfies (1), it does not follow that the order challenged is appealable. Both prongs of the jurisdictional test for the appellate court must be satisfied before the appeal may be brought. As the Fourth Circuit Opinion points out (A 18), Rule 33 of the Federal Rules of Criminal Procedure pertaining to the award of new trials does not deal with a situation in the case at bar. Citing Parr v. United States, 351 U.S. 513, 518 (1956), the Fourth Circuit finds that the final judgement rule (as found in 18 U.S.C.

§1291) applies in criminal as well as in civil cases. The court cites no precedent, but anologizes to Rule 50(c)(1) of the Federal Rules of Civil Procedure. And finds that it does have jurisdiction to review the trial court's award of a new trial to Steed. This decision conflicts with the other Circuit Courts that have had occasion to analyse the appealability of a grant of a new trial.

The government has no mandate which would permit it to appeal orders that are not final decisions. In other words, the government, too is subject to 18 U.S.C. §1291 and any orders which it is permitted to appeal must be final decisions in order to satisfy the second requirement of the jurisdictional inquiry which the appellant court must undertake. Judge Turk's grant of a new trial is not a final order within the meaning of §1291 and is therefore not appealable.

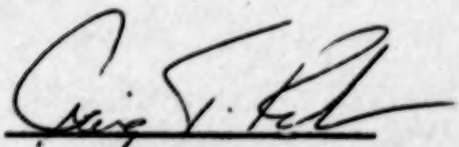
In Dior, supra. the Ninth Circuit Court of Appeals found overriding policy reasons which militate against the appealability of new trial orders before a retrial:

> The appellant review sought by the government is likely to interfere with the proper and efficient functioning of the district court. Appellate intervention in the trial process denies the district court the opportunity to apply its expertise and correct its own mistakes.

These policy considerations attend the grant of the new trial to Steed.

Judge Turk was present throughout the course of Steed's trial; he heard and observed the testimony of each witness and had occasion to examine the documentary evidence which was introduced by the government. It was his decision, based upon his expertise and his attendance and observation at the trial, that Steed's objection to the introduction of certain evidence should have been sustained. He

concluded, therefore, that he had made a mistake in overruling defense objection to the evidence and his grant of a new trial was the proper remedy for such a mistake. As was recognized in Dior, supra at 357, the proper and efficient functioning of the district court demands that the court be given the opportunity to correct its mistakes upon application of its expertise. Judge Turk has done so in this case and granted a new trial. The Fourth Circuit lacks authority to review such an award and the case should be remanded to the trial court for a new trial.



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MAILING CERTIFICATE

The undersigned counsel of record for the Petitioner, having been duly sworn, does hereby depose and say as follows:

(1) I have this 24th day of May, 1982 deposited forty (40) copies of this Petition for Writ of Certiorari in a United States mail box, with first-class postage prepaid, properly addressed to the Clerk of the United States Supreme Court within the time allowed for such filing pursuant to Rule 20 of the Rules of the United States Supreme Court, and

(2) I have this 24th day of May, 1982 deposited three (3) copies of this Petition for Writ of Certiorari in a United States mail box, with first-class postage prepaid, properly addressed to the Solicitor General, Department of Justice, Washington, D.C. 20530 pursuant to Rule 28.4.(a) of the Rules of the United States Supreme Court.

Craig T. Redinger

NOTARIAL CERTIFICATE

State of Virginia, at-large:

I, Kimberly A. Grupp, A Notary Public in and for the State of Virginia, at large, do hereby certify that the foregoing Mailing Certificate was duly sworn to by Craig T. Redinger this 24th day of May , 1982.

Kimberly A. Grupp

My commission expires: 2-3-86